

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1361

RAMSEY HASAN, :

Petitioner, :

vs. :

LANNY GARVAR, D.M.D., et al., :

Respondents. :

ON REVIEW OF A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

MAIN BRIEF OF PETITIONER
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INTRODUCTION

This main brief is filed on behalf of Ramsey Hasan (“Hasan”), the plaintiff in a dental malpractice case against Lanny Garvar, D.M.D., and his P.A. (“Garvar”). The appendix references (“App.”) are to the appendix filed with the district court.

Garvar is insured by OMS National Insurance Company (“OMS”). OMS is defending this malpractice action and retained Michael Barzyk, Esquire, to represent Garvar. His firm has advocated on behalf of Garvar and OMS throughout this case, both at the trial court and appellate court levels. Garvar and OMS want OMS retained counsel to represent a subsequent treating physician who may testify in this case.

STATEMENT OF THE CASE AND FACTS

Jennifer Schaumberg, D.M.D., is an oral surgeon who treated Hasan, thus creating a “physician-patient” relationship with him. Hasan was in the process of

scheduling Dr. Schaumberg's deposition in this case when he learned that OMS had retained an attorney to represent her. OMS also insures Dr. Schaumberg. Dr. Schaumberg is not a defendant or a potential defendant in this malpractice case against Garvar. (App. 1-2). OMS had no contractual obligation to provide her counsel.

Hasan moved for a protective order to prohibit OMS counsel from conducting private *ex parte* interviews with Dr. Schaumberg prior to the taking of her deposition, relying on Section 456.057, Florida Statutes; *Dannemann v. Shands Teaching Hospital and Clinics, Inc.*, 14 So.3d 246 (Fla. 1st DCA 2009); *Hannon v. Roper*, 945 So.2d 534 (Fla. 1st DCA 2007); and *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996) (App. 1-2, 5-6).

The only advocate for allowing OMS counsel a private *ex parte* conference with Dr. Schaumberg was Mr. Barzyk, the OMS retained counsel for Garvar (App. 4-10). Mr. Ragan, the OMS retained attorney purportedly representing Dr. Schaumberg, did not advocate on her behalf (App. 4-10).¹ Dr. Schaumberg was not at the hearing to express her wishes. She did not have independent counsel.

The trial court denied the motion for protective order and authorized an *ex parte* pre-deposition private conference between Dr. Schaumberg and the OMS retained attorney, the substance of which will be subject to attorney-client privilege

¹ Mr. Ragan did file an "Amicus Curia" brief with the district court.

(App. 3). The district court affirmed the order permitting the OMS attorney to have an *ex parte* conference with the doctor. This Court has granted review.

SUMMARY OF ARGUMENT

This Court's decision in *Acosta v. Richter* prohibits *ex parte* communication with a nonparty treating physician, even where the physician is not required to say anything. The Fourth District decision is in irreconcilable conflict with this Court's decision.

Acosta and its progeny preclude adverse party obstruction or interference with the physician-patient relationship. The retention of counsel by Garvar's insurer for a nonparty subsequent treating physician witness is both legally and ethically wrong. Hasan is entitled to unfettered access to his health care providers.

ARGUMENT

I.

THE FOURTH DISTRICT DECISION CONFLICTS WITH *ACOSTA v. RICHTER* ON THE SAME POINTS OF LAW.

In *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996), this Court said and did a number of things. First, it reviewed the history of the physician-patient privilege in Florida. Second, it interpreted the 1988 statutory enactments as creating a physician-patient privilege with explicit and limited circumstances when medical information can

be disclosed. Third, the Court expressly disapproved of *ex parte* conferences with nonparty treating physicians in malpractice cases and specifically held:

Finally, we reject the contention that *ex parte* conferences with treating physicians may be approved so long as the physicians are not required to say anything. We believe it is pure sophistry to suggest that the purpose and spirit of the statute would not be violated by such conferences.

Here in similar fashion, it is pure sophistry to suggest that OMS counsel can meet with Dr. Schaumberg, conduct an interview protected from disclosure under an attorney-client privilege, and not violate either the purpose or the spirit of the statute protecting the physician-patient privilege. Any notion that the physician will just sit there and listen to OMS retained counsel, without any comment on the patient's care, strains credulity to the breaking point and beyond.

The Fourth District decision here is indistinguishable from *Johnson v. Mt. Sinai Medical Center of Greater Miami, Inc.*, 615 So.2d 257 (Fla. 3d DCA 1993), *quashed sub nom.*, *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996), where attorneys constrained by law and ethics from violating the statutory privilege were allowed *ex parte* contact with treating physicians. Physician silence while listening to *ex parte* communication from anyone concerning the malpractice case is not a statutory exception under *Acosta*.

The flaw in the Fourth District’s reasoning is revealed in the following:

We do not believe the temptation to violate a court-ordered prohibition is as strong in situations involving nonparty treating physicians and *their own attorneys*. Though we are not naïve, we also are not so cynical to accept the plaintiff’s assumption that the prohibition will be disobeyed simply because the same insurer is providing attorneys to both the defendants and the oral surgeon, albeit separate attorneys. [Slip op. at 3; emphasis by the court].

In *Acosta*, this Court did not “assume” improper conduct by counsel when it rejected *ex parte* communication with a silent physician, nor did it weigh the relative strength of temptation to violate court orders in reaching its decision. *Acosta* simply recognizes that discussion of the physician’s care and treatment is unavoidable in any *ex parte* conference preparatory to the treating physician’s deposition — where the questioning undoubtedly will be all about care and treatment.

The rule of law announced in *Acosta* is not based on motives of counsel, but on the inability of the plaintiff-patient to demonstrate whether the physician-patient privilege has been violated during the *ex parte* conference. *Acosta* protects against both the intentional and the inadvertent violation of the statutory physician-patient privilege. See also, *Kirkland v. Middleton*, 639 So.2d 1002, 1004 (Fla. 5th DCA 1994):

Respondents also argue they merely intend to question Kirkland's current health care providers about such non-privileged matters as scheduling deposition testimony and arranging medical records production. . . . Were unsupervised *ex parte* interviews allowed, medical malpractice

plaintiffs could not object and act to protect against inadvertent disclosure of privileged information, nor could they effectively prove that improper disclosure actually took place. . . . Petitioners' remedy is here and now with this court or it does not exist.

In *Dannemann* and *Hannon*, *infra*, the First District rejected an attorney-client exception to physician-patient confidentiality. In *Acosta*, this Court held:

We further reject the suggestion that the statute, with its limitations on disclosure, is somehow violative of a defendant physician's First Amendment rights to free speech. We find no First Amendment flaw in the legislature's particular scheme for balancing a patient's individual privacy with society's reasonable need for limited disclosure of medical information. [671 So.2d at 156].

The rule of law is simply stated and is absolute. See, *Lemieux v. Tandem Health Care of Florida, Inc.*, 862 So.2d 745, 748 (Fla. 2d DCA 2003):

Under the plain language of this statute, patient information is privileged and may not be disclosed unless the disclosure falls within one of the statutory exceptions. *Acosta*, 671 So.2d at 155. . . . *No other disclosures are statutorily permitted, and an order allowing for disclosure in any other context departs from the essential requirements of the law.* [e.s.].

The Fourth District decision in this case is in irreconcilable conflict with the rule of law established by this Court in *Acosta*.

II.

THE FOURTH DISTRICT DECISION CONFLICTS
WITH DECISIONS OF THE FIRST DISTRICT COURT
OF APPEAL ON THE SAME POINTS OF LAW.

The facts in this case are indistinguishable from *Dannemann v. Shands Teaching Hospital and Clinics, Inc.*, 14 So.3d 246 (Fla. 1st DCA 2009), and *Hannon v. Roper*, 945 So.2d 534 (Fla. 1st DCA 2007). In all three cases, the malpractice insurers for the defendants in a malpractice case retained counsel to represent nonparty treating physicians who were to be deposed in the malpractice case. The First District has squarely held that separate counsel retained by the insurer cannot conduct *ex parte* conferences with the nonparty treating physician, citing *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996).

In *Hannon*, “[t]he trial court issued an order . . . effectively ruling that the patient confidentiality statute does not prohibit communication between a non-party physician/witness and *his own attorney*.” 945 So.2d at 535 (emphasis by the district court). The First District found this to be a departure from the essential requirements of the law with no adequate remedy on appeal, and quashed the order.

Because we are bound by the unambiguous language of section 456.057(6), we grant the petition. . . . Section 456.057(6), Florida Statutes (2005), clearly forbids Dr. Roper from disclosing information concerning Decedent's medical condition and treatment to an attorney hired by a representative of the defendant hospital [the University's self-insurance program]. [945 So.2d at 536].

In *Dannemann*, the First District reiterated its holding in *Hannon* and quashed a similar order on similar facts:

This court held in *Hannon* that the clear, unambiguous language of the patient confidentiality statute, section 456.057(6), Florida Statutes (2005), presently numbered as subsection (8), prohibits any nonparty physician from disclosing the decedent's medical condition and history to the counsel hired by the defendant's insurer to represent the physician at a deposition. [14 So.3d at 247].

The First District in *Dannemann* also explicitly confirmed the implicit holding in *Hannon*, that the confidentiality statute did not violate the physician's right to counsel under constitutional rights to free speech and due process. *Dannemann*, 14 So.3d at 248. The First District based its ruling on this Court's decision in *Acosta*.

The Fourth District's attempt to distinguish *Dannemann* and *Hannon*, based on the physician's silence during the *ex parte* conference, is a distinction without a difference under this Court's decision in *Acosta*. This Court should approve the *Dannemann* and *Hannon* decisions and reaffirm its holding in *Acosta*.

III.

DEFENSE INSURER RETENTION OF COUNSEL FOR A NONPARTY TREATING PHYSICIAN WITNESS IS LEGALLY AND ETHICALLY UNTENABLE.

The Hippocratic Oath provides, "I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know." Prior to 1988, de-

fendants and their insurers routinely prevailed on treating physicians to violate their ethical obligation of confidentiality. The 1988 Florida legislative response to protect the physician-patient relationship is detailed in *Acosta*. There are also federal HIPAA confidentiality requirements with attendant civil and criminal penalties. Still, insurer interference with the physician-patient relationship remains relentless.

The creative methods by which medical malpractice defendants and insurers have attempted to influence treating physician witnesses over the last quarter century are chronicled in the case law. The legislature took action in 1988, but the medical malpractice defense community has persisted. *Acosta* has, unfortunately, done little to curb this abuse.

This is not an isolated case and it is not about Mr. Ragan or Dr. Schaumberg *per se*. Mr. Ragan filed an affidavit with the Fourth District that acknowledges OMS “policy” to retain counsel for nonparty treating physicians in cases it defends.² OMS is contractually obligated to defend and indemnify Garvar. OMS has no contractual obligation to provide counsel to nonparty treating physician witnesses. The motive behind this OMS “policy” is economic self-interest and is self-evident.

² The affidavit was never submitted to the trial court and was not a part of the record upon which the trial court ruled. The affidavit postdates the trial court order and Hasan’s district court petition. Appellate filings of this sort are generally frowned upon. Cf. *Rampart Life Associates, Inc. v. Turkish*, 730 So.2d 384 (Fla. 4th DCA 1999) (filing non-record material deemed unethical).

In addition to patient confidentiality, the Hippocratic Oath provides:

I will remember that I do not treat a fever chart, a cancerous growth, but a sick human being, whose illness may affect the person's family and economic stability. My responsibility includes these related problems, if I am to care adequately for the sick.

A physician's ethical responsibility to a patient extends beyond mechanical treatment of the medical condition. Physician responsibility includes recognition of the related problems with family and economic instability. Consequential medical bills and loss of earnings are as debilitating as the physical impairment itself.

This adverse economic impact is why an ethical treating physician should cooperate with the patient and be available to the patient when the patient is forced to seek redress for the injuries sustained by the patient. The physician's full cooperation benefits the patient and is ethically sound. There is no comparable ethical predicate for assisting an insurer with economic interests adverse to the patient.

In *Lee Memorial Health System v. Smith*, 36 Fla.L.Weekly D212, 213, 2011 WL 252316 (Fla. 2d DCA 2011), the Second District recently held:

It is extremely important - if not essential - for plaintiff's counsel in a medical malpractice case to interview and consult with his or her client's treating physicians. Such informal contacts enable plaintiff's counsel to discover the facts, formulate legal theories, and develop strategies for the case. [citation omitted]. Although formal depositions may be used to accomplish the same ends, depositions are arguably an inferior means to obtain information necessary for

plaintiff's counsel to prepare the case. [citation omitted]. The practical effect of the rule contended for by Lee Memorial would be to eliminate informal contacts [between a patient's attorney and the patient's treating physician].

The immediate effect of OMS retention of counsel for Dr. Schaumberg in this case was the elimination of the “extremely important - if not essential” ability of Hasan's counsel to consult informally with Hasan's treating physician. Not only has OMS now been granted *ex parte* access to Hasan's treating physician, OMS has now deprived Hasan of *ex parte* informal access to his own treating physician, even though “such informal contacts enable plaintiff's counsel to discover the facts, formulate legal theories, and develop strategies for the case.”

OMS retention of counsel for Dr. Schaumberg has clearly impaired Hasan's ability to prepare his case. There is no countervailing interest at stake. Any attorney/client relationship with OMS counsel is illusory at best, since Dr. Schaumberg is both ethically and legally precluded from discussing the substance of her testimony.

In *Lee Memorial v. Smith*, the Second District concluded that, “the interest requiring protection here is the Smiths' right to communicate with their child's doctors through their duly authorized representatives, not the protection of a client-lawyer relationship.” *Lee Memorial v. Smith*, 36 Fla.L.Weekly at D214; slip op. at p. 5. The same rationale applies here. OMS intermeddling in the physician-patient relationship cannot be condoned.

Apart from medical ethics, legal ethics are involved when an insurer retains counsel for nonparty physician witnesses. The OMS retained attorney for Garvar aptly described the tripartite relationship created by OMS retention of counsel for the non-party witness in this case:

But what happens in Florida, and we always run into this problem, when an insurance company hires the lawyer for the defendant *or the witness in this case*, there's a tripartite relationship. . . . Just because OMSNIC is paying for that lawyer, there is a three-way relationship and there absolutely is an attorney/client relationship. [App. 7; e.s.].

The OMS attorney retained for Dr. Schaumberg undeniably has a tripartite attorney/client relationship with OMS as well as Dr. Schaumberg. Ethically, the OMS attorney can do nothing inconsistent or adverse to OMS interests. This necessarily limits the full range of advice that might otherwise be given. OMS is funding tripartite representation fraught with peril, if not irreconcilable conflict. Cf. Rule 4-1.7, R. Regulating Fla. Bar; and Florida Ethics Opinions 81-5; 75-17 (reconsideration).

A nonparty treating physician is ethically aligned with the plaintiff and should be counseled accordingly. An OMS attorney cannot advise the doctor to honor ethical responsibilities and advocate full cooperation with the patient or his attorneys, because any such cooperation is perforce detrimental to counsel's other client, OMS, and its ongoing defense of Garvar in this case.

The counseling being given to Dr. Schaumberg in this case is unknown and unknowable under the trial court order and Rule 4-4.2, R. Regulating Fla. Bar. As recognized in *Kirkland v. Middleton*, 639 So.2d at 1004: “Were unsupervised *ex parte* interviews allowed, medical malpractice plaintiffs could not object and act to protect against inadvertent disclosure of privileged information, nor could they effectively prove that improper disclosure actually took place.”

No one will ever know what OMS learns from its tripartite relationship with the attorney advising Dr. Schaumberg. The only effective remedy is preclusion of *ex parte* conferences with insurer retained counsel and nonparty treating physicians.

Section 456.057, Florida Statutes, provides:

(7)(a) Except as otherwise provided in this section and in s. 440.13(4)(c), such records may not be furnished to, and *the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient.* However, such records may be furnished without written authorization under the following circumstances:

* * *

(8) Except in a medical negligence action or administrative proceeding when a health care practitioner or provider is or reasonably expects to be named as a defendant, *information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care practitioners and providers involved in the care or treatment*

of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given. [e.s.]

The statute prohibits discussion of the patient with “any person” other than those expressly identified in the statute. A physician’s personal attorney is not among them. An attorney retained by a defendant’s insurer is not among them. The only time a physician can discuss a patient with someone other than the patient or the *patient’s* legal representative is when the physician is or reasonably expects to be named as a defendant. That is not the case here. The statute and *Acosta* control.

CONCLUSION

This Court should quash the decision rendered by the district court in this case and protect Hasan’s statutory right to physician/patient confidentiality.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy was served on Paul Freedman, Esquire, Kaplan and Freedman, P.A., 9410 S.W. 77th Avenue, Miami, Florida 33156; Michael Barzyk, Esquire, McIntosh, Sawran, et al., 1776 E. Sunrise Boulevard, P.O. Box 7990, Ft. Lauderdale, Florida 33338-7990; and Michael Ragan, Esquire, Demahy, Labrador, et al., 150 Alhambra Circle, Penthouse, Coral Gables, Florida 33134, this 16th day of February, 2011.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY compliance with font requirements.

By _____
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